BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICK E. HUMBLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,689
GENERAL MOTORS CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals from the October 13, 1999, Award of Administrative Law Judge Julie A. N. Sample. Claimant was awarded a 15 percent permanent partial general body disability for injuries arising out of and in the course of his employment with respondent in Kansas. Oral argument to the Board was held February 23, 2000.

APPEARANCES

Claimant appeared by his attorney, Michael R. Wallace of Shawnee Mission, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Jair E. Mayhall of Kansas City, Missouri. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

(1) Did claimant meet with personal injury by accident through a series of microtraumas involving his left upper extremity through October 22, 1998?

(2) Did claimant's alleged accidental injury to his left upper extremity arise out of and in the course of his employment with respondent in the State of Kansas?

(3) Did the Administrative Law Judge err in excluding certain evidence submitted by respondent, detailing claimant's past injuries and medical history?

(4) Did the Administrative Law Judge err in denying respondent a reduction in claimant's award pursuant to K.S.A. 1999 Supp. 44-501(c) and based upon the medical opinion of Lynn D. Ketchum, M.D., regarding claimant's preexisting functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant is a 43-year-old manual laborer who has worked for respondent for over 23 years. Claimant was diagnosed with carpal tunnel syndrome in his left hand in 1987 while working at respondent's plant in Kansas City, Missouri. Carpal tunnel surgery was successfully performed, and claimant was released to return to his same job. There were no accommodations made at that time. Claimant, shortly thereafter, moved to Lordstown, Ohio, where he worked in respondent's Ohio facility. He first began experiencing pain in his right upper extremity in 1992 or 1993 while working in Ohio. Claimant was diagnosed with bilateral carpal tunnel syndrome and was treated, at that time, with over-the-counter pain medication and splints. Claimant was about to be transferred back to the Kansas City area and elected to wait until he relocated to seek further medical treatment. Claimant transferred to respondent's Kansas City, Kansas, Fairfax Plant in 1994. Even with his previous problems, claimant successfully passed a pre-employment physical at respondent's plant and, shortly thereafter, began working at his regular job as a deck seal installer.

Through the remainder of 1994 and into 1995, claimant worked his regular job, although he did notice the pain in his hands, the right more than the left, was becoming worse. In late 1995, claimant sought treatment from the plant's medical department and was provided conservative treatment. This conservative treatment, through only the plant medical department, continued through 1996, 1997 and into 1998. In October 1998, claimant was referred to a physician for an EMG, which confirmed bilateral carpal tunnel syndrome.

Claimant was referred to Craig Newland, M.D., board certified in orthopedic and hand surgery, who first began treating claimant on October 15, 1998. He found claimant

to have carpal tunnel syndrome in the right upper extremity, although the doctor acknowledged, when claimant first presented to him, claimant had complaints in both wrists and hands and numbness in his fingers bilaterally. From the history provided by claimant, Dr. Newland opined that claimant suffered an onset of bilateral carpal tunnel syndrome approximately six months prior to his first examination date. He was aware that claimant had undergone prior carpal tunnel surgery on the left, but was provided no medical records associated with that treatment. He was also aware that claimant had suffered an injury as a child to his right upper extremity when he fell on a pop bottle. Dr. Newland was not aware of the extent of the injury or whether claimant had suffered any type of nerve laceration at that time. He was also not provided any medical records from that earlier right upper extremity injury.

Dr. Newland performed a right carpal tunnel release and, after a period of care, released claimant to return to work at respondent's plant. He assessed claimant a 10 percent functional impairment to his right upper extremity, attributable to the carpal tunnel syndrome.

While Dr. Newland acknowledged that claimant had a potential problem with his left upper extremity, he did not treat claimant's left upper extremity. The doctor could not, therefore, provide an opinion regarding what, if any, functional impairment claimant may have had on that side.

Dr. Newland was questioned regarding claimant's preexisting conditions, both from the 1987 carpal tunnel syndrome and from the right upper extremity injury from claimant's childhood. While he agreed that it would be feasible to provide a functional impairment rating from claimant's prior medical conditions, both on the right and the left, he was unable to provide an opinion because he had not been provided with any of claimant's prior medical records upon which to draw any conclusions or base any opinions.

Dr. Newland was also questioned regarding whether the repetitive, day-to-day work activities on an assembly line would either be causative or a contributing factor to the development of carpal tunnel syndrome. He responded that he was unaware of any uncontroverted scientific data to that effect. He did, however, acknowledge that, in claimant's case, a proper working hypothesis would be that claimant's work activities with respondent contributed to his development of carpal tunnel syndrome.

Claimant was referred by his attorney on February 10, 1999, to James P. Hopkins, M.D., board certified in plastic and reconstructive surgery. Dr. Hopkins, a fellow in the American Academy of Disability Evaluating Physicians, limits his current practice to evaluations, examinations and ratings. He ceased performing hand surgery in 1992. Currently, 100 percent of his practice is related to the medical/legal field and he dedicates 100 percent of that to evaluating claimants.

At the time of the examination, claimant had complaints in both wrists and elbows. Dr. Hopkins was aware of claimant's prior history, including the carpal tunnel surgery in 1987 and the bilateral difficulties experienced at respondent's plant in Ohio. He assessed claimant a 20 percent impairment to the right upper extremity to above the elbow and a 5 percent impairment to the left upper extremity at the same level. He deducted 5 percent to the right upper extremity due to the previous injury suffered by claimant to his median nerve when he was a teenager. This injury apparently involved some sensory deficit loss, which Dr. Hopkins opined continued to the present day. He then converted the 15 percent to the right upper extremity and the 5 percent to the left upper extremity to a 12 percent permanent partial general disability to the body as a whole. His impairment opinions were based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. While he was aware of the prior carpal tunnel release performed by Dr. John Moore in 1987, Dr. Hopkins testified that it would be impossible to give any impairment rating for that injury absent medical records, including EMGs, from that time. He also stated that, even though he was aware that claimant suffered bilateral symptoms in Ohio, he would be unable to assess any disability from that series of injuries without having had the opportunity to examine and evaluate claimant at that time.

On April 29, 1999, claimant was referred by the Administrative Law Judge to Lynn D. Ketchum, M.D., a board certified orthopedic surgeon, for an independent medical examination. Dr. Ketchum diagnosed moderately severe carpal tunnel syndrome in the right upper extremity and mild carpal tunnel syndrome in the left upper extremity. He assessed claimant a 20 percent impairment to the right upper extremity and a 5 percent impairment to the left upper extremity which, when converted, equates to a 15 percent general body disability. His opinion is based on the AMA Guides, Fourth Edition.

Dr. Ketchum was provided a history from claimant. However, this history did not include claimant's 1987 carpal tunnel surgery or the fact that he had worn splints bilaterally and had been on restrictions while working at respondent's Ohio plant before coming to Kansas City, Kansas. He did have a note in his handwritten records about claimant's 1987 carpal tunnel surgery, but it was not mentioned in the history provided by claimant. Dr. Ketchum was advised by claimant that he had suffered a severed nerve in his right upper extremity when he was 13 years old. However, claimant advised Dr. Ketchum he had no symptoms after that injury, and Dr. Ketchum opined that claimant suffered no permanent effect on his median nerve from that injury.

At the time of his deposition, Dr. Ketchum was provided several medical reports, including nerve conduction studies from the Arthritis Center of Northeast Ohio in 1993 and a report from Dr. Rothschild dated February 1, 1993, also from the Arthritis Center. He was also provided progress notes from the respondent's plant medical records from 1993. These 1993 studies indicate claimant had mild carpal tunnel syndrome bilaterally, with no indication of a significant injury to the median nerve. EMGs provided from 1998 indicated

that claimant's condition had progressed to the severe level, indicating a definite worsening.

Dr. Ketchum was then asked whether he had an opinion as to what, if any, impairment rating claimant would have had in 1993. Dr. Ketchum stated claimant would have had a 10 percent impairment bilaterally as a result of the injuries suffered in 1993. However, by the time Dr. Ketchum examined claimant in 1999, he opined claimant's left upper extremity had improved to a 5 percent impairment.

Dr. Ketchum was provided no medical records from Dr. Moore or from the hospital regarding the 1987 surgery. Dr. Ketchum's opinion, therefore, did not take into consideration Dr. Moore's 1987 carpal tunnel surgery to the left upper extremity, as, without EMGs or strength measurements performed at that time, he was unable to say what impairment claimant suffered postoperatively.

As of the date of his deposition, the doctor was provided with certain records from 1993, including medical records, EMGs and plant records from respondent's General Motors plant in Ohio. He was not, however, provided all the records and, therefore, did not have a complete history of claimant's preexisting injuries or the treatment provided for those injuries.

Dr. Ketchum provided his impairment rating in an April 29, 1999, report to the Administrative Law Judge. In that report, Dr. Ketchum confirmed the 20 percent impairment to the right upper extremity and 5 percent impairment to the left upper extremity. There is no mention in the report of any preexisting impairment associated with claimant's 1987 carpal tunnel surgery, the injury suffered when claimant was a teenager, or any problems associated with his employment with respondent prior to 1994. On cross-examination, Dr. Ketchum was asked whether his impairment, provided in the April 29, 1999, letter, was based upon his opinion of claimant's condition as of that date. Dr. Ketchum answered yes.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which his or her right depends by a preponderance of the credible evidence. *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the

responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Appeals Board finds claimant suffered accidental injury arising out of and in the course of his employment with respondent beginning with his return to Kansas in 1994 and continuing through October 22, 1998. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999). The injuries suffered by claimant involve both his right and left upper extremities, with these injuries occurring simultaneously as a result of claimant's repetitive activities at work. Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986).

The fact that claimant was diagnosed with bilateral carpal tunnel syndrome prior to coming to Kansas in 1994 and actually underwent left carpal tunnel surgery in 1987 does not relieve respondent of its responsibilities under the Kansas Workers Compensation Act. When dealing with microtrauma injuries, it is the development of the injury, rather than its original manifestation, which is the determining factor concerning when and where the claimant may have suffered accidental injury. Graff v. TWA, 267 Kan. 854, 983 P.2d 258 (1999).

Even Dr. Newland, respondent's expert and claimant's treating physician in 1998 and 1999, acknowledged that claimant first presented himself in Dr. Newland's office with bilateral upper extremity symptoms. While Dr. Newland only treated the right upper extremity, this does not relieve respondent of the liability for the bilateral injuries which developed during claimant's employment from 1994 through 1998.

The medical reports provided to Dr. Ketchum during his deposition, including the Arthritis Center reports, nerve conduction studies and the plant records from 1993, are not admissible. K.S.A. 44-519 states:

> No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

However, a testifying physician may consider the medical opinions generated by absent physicians, if the testifying physician is expressing his or her own opinion rather than that of the absent physician. Boeing Military Airplane Co. v. Enloe, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989). The Administrative Law Judge was correct in finding that there was no admissible evidence upon which Dr. Ketchum could base an opinion regarding preexisting impairment. However, that

inadmissible evidence could be utilized by Dr. Ketchum to generate his own opinion regarding claimant's preexisting impairment. Medical records from the General Motors plant and from the Arthritis Center of Northeast Ohio were properly considered by Dr. Ketchum in formulating his own opinion regarding what, if any, functional impairment claimant may have had prior to his 1994 through 1998 Kansas employment with respondent.

The Appeals Board must, as the fact-finder, determine the weight to be given to Dr. Ketchum's medical opinion. The medical reports of claimant's prior conditions were not provided to Dr. Ketchum until the day of the deposition on August 2, 1999. This is over three months after Dr. Ketchum examined claimant on April 29, 1999. The medical report generated by Dr. Ketchum from the examination makes no mention of any preexisting problems. It does not mention claimant's injury to his right upper extremity in his teenage years or the left upper extremity carpal tunnel surgery performed by Dr. Moore in 1987. The history provided to Dr. Ketchum by the claimant does not discuss the carpal tunnel surgery or the fact that he had worn splints bilaterally and had been on restrictions prior to returning to Kansas from Ohio. Finally, the medical records that were provided to Dr. Ketchum were incomplete, including only a portion of the total medical records from claimant's 1993 and earlier treatments. The Appeals Board, therefore, finds that, while Dr. Ketchum had the right to consider those medical reports in forming his opinion, Dr. Ketchum's opinion deserves little or no weight regarding claimant's preexisting functional impairment.

In addition, claimant testified to having very little effect from the childhood injury suffered to his right upper extremity. Finally, after the 1987 carpal tunnel surgery to his left upper extremity, claimant returned to his regular job with respondent and, in 1994, passed respondent's pre-employment physical.

The Appeals Board finds that respondent has failed to prove what, if any, preexisting impairment claimant experienced as a result of any injuries suffered prior to beginning his employment with respondent in Kansas in 1994. Therefore, respondent's request for a reduction in the amount of claimant's award for a preexisting functional impairment under K.S.A. 1998 Supp. 44-501 is denied.

Both Dr. Ketchum and Dr. Hopkins found claimant to have a 20 percent impairment to the right upper extremity and a 5 percent impairment to the left upper extremity. Dr. Hopkins, however, reduced claimant's right upper extremity impairment by 5 percent due to the previous injury suffered by claimant to his median nerve when he was a teenager. This determination was based upon claimant's comments to Dr. Hopkins that he suffered a sensory deficit in that upper extremity at that time. However, claimant, at the time of regular hearing, testified that he suffered no physical symptoms relating to that injury, he was not limited in any way in his life's activities and he suffered no numbness in the right upper extremity after that injury. The Appeals Board finds Dr. Hopkins' opinion

in direct conflict with claimant's testimony regarding claimant's prior right upper extremity injury, and is disregarded.

Both Dr. Hopkins and Dr. Ketchum assessed claimant a 20 percent impairment to the right upper extremity and a 5 percent impairment to the left upper extremity which, when combined, computes to a 15 percent whole person impairment. Absent proof of preexisting impairment, the Appeals Board finds this award appropriate.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated October 13, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority's award because it includes the amount of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides, inter alia, that:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record shows that claimant suffered from a preexisting condition. He had prior upper extremity injuries and a left carpal tunnel release surgery. It is clear that claimant had some preexisting functional impairment. Both Dr. Hopkins and Dr. Newland attest to this. What is not clear, however, is how much of claimant's current functional impairment is new, that is to say how much is a result of this series of accidents, and how much preexisted. Dr. Ketchum initially attributed all of his rating to the current injury, but this opinion was based upon an incomplete history. Therefore, I agree with the majority that the record fails to establish the percentage of preexisting impairment. But claimant bears the burden of proving the nature and extent of his disability. This burden includes proving how much of his present impairment is from this work-related accident.

K.S.A. 44-501(a) clearly places the burden of proof on the claimant to prove all of the various conditions upon which his entitlement to compensation depends. The majority shifts this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment.

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BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS
Jair E. Mayhall, Kansas City, MO
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director